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In The

Supreme Court of the United States

October Term, 1990

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION
and CF&I STEEL CORPORATION,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

Of Counsel:
[redacted]
Senior Counsel
[redacted]
Deputy General Counsel
[redacted] Association
of Manufacturers
[redacted] Pennsylvania Ave., N.W.
[redacted] 1500—North Lobby
[redacted], DC 20004-1703
[redacted]

[redacted] E. Chandler
Vice President and
General Counsel
Motor Vehicle Manufacturers
Association
7430 Second Ave., Suite 300
Detroit, MI 48202
(313) [redacted]

September 16, 1992

W. SCOTT RAILTON *
BROOKE BASHORE-SMITH
REED SMITH SHAW & MCCLAY
Ring Building
1200 18th Street, N.W.
Washington, DC 20036
(202) 457-4162
Counsel to Amici Curiae, National Association of Manufacturers and Motor Vehicle Manufacturers Association

* Counsel of Record

Wilson - [redacted] Co., Inc. - [redacted] - WASHINGTON, D.C. 20001

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OCTOBER TERM, 1990

No. 89-1541

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
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v.

OCCUPATIONAL SAFETY AND
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

Amici Curiae file this Brief in support of Respondents pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The written consents of Petitioner and Respondents have been filed with the Court.

INTEREST OF AMICI CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of over 13,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the na-

tion's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAM and these councils are vitally interested in a balanced and proper interpretation of occupational safety and health regulations, and are particularly concerned about the issue in this case.

The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") is a voluntary nonprofit association of domestic companies engaged in the manufacture and sale of motor vehicles in the United States. MVMA's members assemble ninety-four percent of the cars, trucks and buses produced in the United States and operate more than three hundred manufacturing and related facilities. Most of MVMA members' 730,000 employees are subject to regulations promulgated by the Occupational Safety and Health Administration ("OSHA") and, therefore, have a stake in the outcome of this litigation.

NAM and MVMA represent employers nationwide, all of whom have a significant interest in the question presented in this case. This Court has been asked to determine whether judicial deference is owed to the Occupational Safety and Health Review Commission ("Commission") or to the Secretary of Labor ("Secretary") when they differ in their interpretations of an admittedly ambiguous regulation issued pursuant to the rulemaking provisions of the Occupational Safety and Health Act ("the Act" or "the OSH Act").

At the heart of this question is how Congress envisioned the Commission's role in the statutory scheme and what powers are necessary for it to fulfill its intended function. The legislative history demonstrates that Congress withdrew adjudicative authority from the Secretary and created the Commission in response to the business community's strongly held concern that combining rulemaking, prosecutorial and adjudicative authority in the Secretary could produce decisions biased

against employers. Congress went to great lengths to keep the Secretary's prosecutorial power separate and distinct from the Commission's judicial power.

The only way to effectuate the Legislature's intended separation of powers is to afford judicial deference to the Commission when its interpretation of an ambiguous regulation differs from the Secretary's, especially when, as here, the Secretary has expressed no interpretation at all prior to prosecuting the enforcement proceeding.

It is common practice for OSHA's enforcement personnel to adopt an interpretation of a safety or health standard when issuing citations for alleged violations of the Act to employers as occurred in this case. The OSHA district office believed that employees of CF&I Steel Corporation were not properly fitted with respirators and were, therefore, exposed to respirable coke oven emissions. The officials believed, erroneously as it turns out, that the occupational health standard which applies to this situation was not enforceable. Accordingly, they determined to cite the employer under another standard, which if read in isolation, might arguably proscribe the alleged violative conduct. In sum, local agency enforcement personnel observed what they believed was an unsafe condition. When they did not find a regulation which covers the condition, they determined to "interpret" another regulation in a manner to obtain abatement.

Judicial deference to the Secretary's, or, in reality, her staff's, prosecutorial opinions in circumstances like these would nullify the Commission's role as an independent adjudicatory body and hold employers to "rules" on which they never had an opportunity to comment and on which they received no prior notice. Such concentrated power in the Secretary is precisely what Congress sought to avoid in creating the Commission. If the Commission is denied the power to interpret ambiguous regulations,

it will become an "umpire" calling balls and strikes on purely factual issues instead of acting as the independent adjudicatory body Congress intended and upon which many employers relied in supporting occupational safety and health legislation.

The Commission's independent adjudicatory role is as vital to continued employer acceptance of the Act as it was to the Act's original passage, and, accordingly, NAM and MVMA submit that this Court should affirm the Tenth Circuit's ruling in this case giving deference to the Commission's interpretations of ambiguous OSHA regulations.

SUMMARY OF ARGUMENT

Judicial deference to Commission interpretations of ambiguous OSHA regulations fulfills the Legislature's intent in establishing the Commission as an independent adjudicatory body created to provide all parties a fair and unbiased hearing in enforcement proceedings. If the Commission were forced to accept the Secretary's "interpretation" of an ambiguous regulation made for the purpose of prosecuting a citation, the Commission would find itself acting merely as a fact-finding body. The Commission would have no true adjudicatory power.

Furthermore, deference to the Secretary's interpretation of an ambiguous regulation would permit the Secretary to, in effect, act outside the deliberative rulemaking framework provided by the Act and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, by adopting policies or amending rules as a litigant during adjudication, when Congress vested the adjudicatory role solely in the Commission. Finally, deference to the Secretary's position in this case would directly conflict with this Court's rulings rejecting the notion of deference to agency litigating positions.

The Tenth Circuit's ruling recognizes that the Commission's interpretation of the disputed regulation during adjudication constituted the final agency action in this case, and accordingly, that opinion is owed deference by the reviewing Court. This Court, therefore, should resoundingly affirm the Tenth Circuit's opinion.

ARGUMENT

DEFERENCE MUST BE GIVEN TO THE COMMISSION'S INTERPRETATION OF AMBIGUOUS REGULATIONS IN ORDER TO EFFECTUATE THE LEGISLATURE'S INTENT IN CREATING AN INDEPENDENT ADJUDICATORY BODY UNDER THE ACT

The Act represents a major legislative milestone in government's effort to deal with the problems of injuries and illnesses arising out of employment and places of employment. The problems have existed since at least as early as the industrial revolution. During the nineteenth century the legal system essentially treated workplace injuries and illnesses under the law of torts. When it became evident that tort-based remedies did little to reduce the problems, legislative bodies generally adopted workmen's compensation laws in the hope that the economic disincentives of mandatory insurance premiums would induce employers to lower injury and illness incidences. Bokat & Thompson, *Occupational Safety and Health Law*, Chapts. 1 & 25 (1988). In the late 1960's, however, Congress became concerned that state laws were not adequately addressing the problems. As a consequence, the Senate Labor Committee and the House Committee on Education and Labor both reported out similar occupational safety and health bills proposing safety and health standards legislation with the authority for administration being vested in the Secretary. Comm. Print. Senate Comm. on Labor and Pub. Welfare, *Legislative History of the Occupational Safety and Health Act of 1970*, 92d Cong., 1st Sess. at 204 *et seq.* and at 893 *et seq.*[1]

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[1] Hereinafter referred to as "Legislative History."

Under the bills (S. 2193 and H.R. 16785) the Secretary was authorized to promulgate occupational safety and health standards using essentially informal rulemaking procedures of the kind authorized by the APA. *See, e.g., Legislative History* at 238-46. Both bills required that employers comply with safety and health standards. *Id.* at 238. The bills also authorized the Secretary to investigate for compliance, to issue citations and propose civil penalties for alleged violations of safety and health standards, and to hear employer contests of citations and proposed penalties.

This legislation produced "the most bitter labor-management political fight in years." *Id.* at 193 (individual views of Senator Javits). The Secretary of Labor was, in essence, viewed by the business community as the Government's spokesperson for employees and particularly the spokesperson for organized labor. There was grave concern that employers could not obtain a fair deal from the Secretary of Labor. The concern was so "bitter as to jeopardize seriously the prospects for enactment." *Id.* at 194.

As a consequence, the Administration introduced substitute bills through Congressmen Steiger and Sikes in the House (H.R. 19200) and Senator Dominick in the Senate (S. 4404). *See id.* at 193. These bills proposed that normal administrative law procedures and concepts be altered dramatically. The substitute bills would have required that the rulemaking authority be allocated to the National Occupational Safety and Health Board ("the Board"), an independent agency to be established within the executive branch of government. *See, e.g., id.* at 779-82 (Sec. 8, H.R. 19200). Under the substitute bills, the Board would have been authorized to promulgate safety and health standards using formal rulemaking procedures of the kind authorized by sections 556 and 557 of the APA. *See Legislative History* at 773, 780-81.

It was also proposed in the substitute bills that employer contests of citations and proposed civil penalties be heard by another and different independent agency located within the executive branch, the Occupational Safety and Health Review Commission. *See id.* at 787-95 (Sec. 11, H.R. 19200).

Under the Administration bills, the Secretary of Labor was authorized only to conduct compliance inspections, to issue citations for alleged violations of the Act, to propose civil penalties, and to prosecute citations and penalty proposals before the Commission. *See, e.g., id.* at 782-87, 790 (Secs. 9, 10 and 11B(a), H.R. 19200). The Secretary also was authorized to propose safety and health standards and amendments of standards to the Board. *See, e.g., id.* at 772-73.

The Steiger-Sikes substitute bill (H.R. 19200) prevailed in the House. *Id.* at 1112. The House of Representatives, therefore, approved the proposal to divide normal APA roles and procedures into three parts each of which would be administered by different and independent agencies within the Executive branch. In particular, approval by the House of an independent board to promulgate safety standards clearly indicates skepticism for the concept that the Secretary would act fairly as a rulemaker.

The United States Senate, however, did not adopt the Administration's substitute S. 4404 as offered by Senator Dominick. Instead, it accepted the compromise offered by Senator Javits. *See id.* at 194-95, 462-79. The compromise established the Commission as an independent agency to hear and determine employer contests while giving the Secretary authority to promulgate rules and to prosecute alleged violations.

This bifurcation of the administrative power was deliberately taken by the Congress and the Administration

to obtain acceptance by the business community for the new approaches the Act takes to abate workplace injuries and illnesses. The Secretary's position in this litigation will seriously undermine the compromise made at the time the Act was passed by Congress and became law. It would relegate the Commission to acting little more than as a specialized jury charged merely with fact finding according to the Secretary's instructions. The history of the Act demonstrates that Congress intended that the Commission play a significant role as an arbiter of disputes between the Secretary on the one hand and employers on the other hand. To permit the Secretary the authority to state what the law is to the Commission in an adjudication is to impermissibly allow her to assume the role Congress assigned to the Commission.

Because Congress chose the Commission as the adjudicating agency and because it is specially qualified and "intimately familiar through day-to-day adjudication" with the objectives of the Act, the choice between alternative interpretations of OSHA regulations is properly committed to it. *See Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974); *Brennan v. Occupational Safety and Health Review Commission ("OSHRC") and Republic Creosote Co.*, 501 F.2d 1196, 1198-99 (7th Cir. 1974). As the courts of appeals which have affirmed the concept that the Commission's interpretation of ambiguous regulations is entitled to deference have noted, the Commission is comprised of experts in the field of occupational safety and health who are appointed by the President and confirmed by the Senate. *See* 29 U.S.C. § 661(a); *Republic Creosote Co.*, 501 F.2d at 1189-99; *Donovan v. Castle & Cooke Foods*, 692 F.2d 641, 646 (9th Cir. 1982); *Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000-01 (9th Cir. 1986).[2]

[2] That the Secretary's recommended interpretation of a regulation should not control the Commission's conclusion is supported by the fact that Congress has authorized the Secretary to petition for judicial review of adverse Commission rulings. 29 U.S.C. § 660(b). *See Brennan v. OSHRC*, 513 F.2d 713, 715 (8th Cir. 1975). A grant of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) deference on judicial review effectively nullifies two levels of Commission proceedings to the detriment and at the expense of the other litigants. Such a result clearly could not have been intended by Congress.

The importance of an independent adjudicatory panel in procuring the business community's acceptance of the Act cannot be minimized. Senator Javits, sponsor of the compromise legislation characterized the issue of an independent adjudicatory body as "the nut in the coconut . . . . This is what it is all about." *Legislative History* at 463-64. He stated that "despite the substantial agreement which exists as to the objective of this legislation, the most bitter labor-management political fight in years has erupted over the means to achieve that objective." *Id.* at 193.

While due process was protected whether judicial authority was lodged with the Secretary or an independent panel, Senator Javits approached the issue from a far more practical standpoint—how to inspire confidence in the community expected to obey the law.[3] *Id.* at 469. What the business community sought was a fair and unbiased forum in which they could challenge the Secretary's enforcement of the Act. This was not a matter of due process, general tradition or general procedure. Instead, it was "a matter of designing a particular remedy for a particularly difficult situation," *id.*, and the business community felt an "infinitely greater assurance with this kind of commission than with en-

[3] Employer acceptance of OSHA was essential for passage and critical to successful implementation of the Act. Employer acceptance of the Act and confidence in its adjudicatory mechanism make voluntary compliance with the Act's provisions more likely. Employer self-regulation is crucial because the Department of Labor simply lacks the resources to monitor OSHA compliance in all workplaces.

forcement by the Secretary of Labor." *Id.* at 463-64.[4] Senator Javits noted that an independent commission was favorable because if the Secretary were the prosecutor and judge, any decision in favor of the employer would be a repudiation of the Secretary's own employees. *Id.* at 195. An "autonomous an independent" commission, on the other hand, inspired greater confidence in business because it could find for or against the Secretary without any overriding concerns of agency loyalty. *Id.* at 462-63.

Congress intended the adjudicatory role under OSHA to encompass the "same authority as would be given to a judge." *Id.* at 466.[5] Commission supporters made it

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[4] Senator Holland, speaking in support of an independent commission, noted that the unique history of management-labor relations makes an adjudicatory commission more important than in other areas, such as agriculture, where rulemaking, enforcement and adjudicatory functions reside in the same agency. The labor context has always involved a certain degree of combativeness, making an independent judicial commission more necessary so as not to be regarded as too close to labor or too close to management. *Legislative History* at 474.

[5] The Commission's role is clearly distinguishable from the Mine Safety and Health Review Commission upon which the Secretary relies in support of her position. Unlike the Act, the legislative history of the Mine Act specifically states "it is the intention of the Committee . . . that the Secretary's interpretation of both law and regulations shall be given weight by both the Commission and the courts." *S. Rep. No. 181*, 95th Cong., 1st Sess. 49 (1977). Congress obviously intended the opposite result under the OSH Act, as it specifically created the Commission as an independent adjudicatory body. Had Congress intended the courts and Commission to defer to the Secretary, it could have so provided as it did in the Mine Act.

The Secretary's analogy to the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act is likewise inapposite. The Benefits Review Board holds an adjudicatory role *within* the Department of Labor and its members are selected solely by the Secretary without the advice or consent of the Senate. 33 U.S.C. § 921(b). In creating the Commission, however, Congress

clear in the legislative debates that "judicial temperament" is what the President and Senate should seek in appointing and confirming members of the Commission. *Id.* at 475. In fact, in proceedings contesting a citation, the Legislature specified that the judicial function includes adjudicating, "among other things, the *validity of the standard, rule, order, or regulation* alleged to have been violated and the reasonableness of the time permitted for the correction of the violation." *Id.* at 854.[6] This is the judiciary's traditional role.

The ability to interpret and apply the law is part and parcel of any true judicial body and, as stated by Senator Javits, the Commission is to act with a full complement of judicial power—as both *judge* and *jury*. As a judge, the Commission must interpret the law at least to the extent necessary to perform its fact-finding role in deciding the enforcement action before it. Presidential appointment of Commission members with the advice and consent of the Senate, combined with their statutorily mandated experience and training, permits the Commission to perform both functions independently of the Secretary and Department of Labor. *See id.* at 466.

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was aware that the Secretary could create a board in the Department of Labor to hear appeals of citations and penalty proposals. *See Legislative History* at 195. It rejected that framework in favor of a completely independent adjudicatory Commission with significant expertise and adjudicatory power. If the Commission is analogous to the Benefits Review Board as the Secretary argues, then the legislative compromise that created the Commission was a sham.

[6] Although the House Committee Report involved the original version of the bill in which the Secretary was the adjudicator, the judicial function could not have been intended to be weaker if performed by an independent Commission. Thus, Congress must have intended to vest in the Commission the power to reasonably interpret an ambiguous regulation and to determine its validity, as the Commission did in this case.

If the Commission were not empowered to interpret the applicable law or regulations upon which a given citation is based, its role would be insignificant in the administrative framework of the Act. The Commission would be relegated to acting as an umpire calling balls and strikes on purely factual issues, a result directly contrary to congressional intent. The Commission in such circumstances would be trivial. Its role would be reduced to merely determining, e.g., whether a guardrail was 42 inches above a floor (29 C.F.R. § 1926.500(f)(1)) or whether personal protective equipment was needed to protect against an environmental hazard (29 C.F.R. § 1920.132). A role of this kind could have been fulfilled by a panel within the Department of Labor. *See Legislative History* at 195. Congress, however, created the Commission as an independent agency within the Executive branch and expected it to fulfill a more important role than that of an umpire.

Requiring judicial deference to the Secretary's interpretation of an ambiguous regulation in a case such as the present one not only frustrates the Legislature's intent in creating an independent adjudicatory body with full judicial power, but also has the practical effect of permitting "rulemaking" outside the prescribed statutory framework. While the Secretary argues in this case that hers must be the "true" interpretation of 29 C.F.R. § 1910.134, as incorporated in 29 C.F.R. § 1910.1029(g)(3), because she promulgated it, in reality, the regulation was ambiguous and had not been interpreted in this fashion prior to the time the Secretary instituted a prosecution in this case.[7]

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[7] Furthermore, the Secretary was not the author of 29 C.F.R. § 1910.134. It was one of the national consensus standards that Section 6(a) "required" the Secretary to promulgate within two years of the Act's effective date for the purpose of providing an immediate body of safety and health law. The Secretary's interpretation is less compelling when the regulation has been adopted from a consensus standard. *Marshall v. Anaconda Co.*, 596 F.2d 370, 374 (9th Cir. 1979); *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 160 (3d Cir. 1978).

As rulemaker under the APA, the Secretary has multiple opportunities in notices of proposed rulemaking and in the preamble to her final rules to comment on and interpret the regulations she would promulgate. That is the proper time for the Secretary to express or clarify the intention of the regulation. However, when the Secretary fails to interpret an ambiguous regulation or to convey its purported meaning prior to enforcement, it is the power to adopt rules or policies in *adjudication* that becomes the central issue. *See Gilles & Cotting, Inc.*, 504 F.2d at 1262. It is the Commission and not the Secretary that is charged with the final adjudication of enforcement cases under the Act, and it is the Commission's determinations that the Act authorizes the courts to review. 29 U.S.C. §§ 659, 660(a) (1988). The Commission being comprised of technical experts can be expected to give the Secretary's ambiguous regulations a fairer construction than the Secretary might in fulfilling her role as a prosecutor. This is the "nut in the coconut" intended by the compromise which Senator Javits introduced. The Secretary, if dissatisfied with the Commission's interpretations, is not without remedies. The Secretary can appeal those decisions. Moreover, the Secretary always has her rulemaking authority available to exercise if she believes a safety and health standard requires amendment.

The present case illustrates the procedure followed in typical enforcement cases under the Act and highlights why the issue of deference is so critical to employers. This case does not involve the Secretary "pronouncing" the meaning of 29 C.F.R. § 1910.134 or § 1910.1029(g)(3). Instead, it arises out of a compliance officer's belief that CF&I Steel violated the regulations according to the *officer's* interpretation of them. The employer's only re-

course from the enforcement officer's position is to challenge it before a Commission administrative law judge ("ALJ"). The Department of Labor assigns a regional solicitor to prosecute the case and that lawyer generally adopts the compliance officer's opinion wholesale. By the ALJ stage, and certainly if further review is sought before the entire Commission, the enforcement officer's interpretation turned litigation position acquires an aura of official sanction by the Secretary—without her *ever* having been directly involved or issuing a formal regulatory interpretation.[8]

Clearly, the Commission or judiciary need not defer to representations or interpretations made by an OSHA compliance officer. *See L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C. Cir. 1982). However, that is the practical effect of deference to the Secretary's prosecutorial position in a case such as this. Moreover, judicial interpretation has emphasized that the Secretary's prosecutorial power is to remain separate and distinct from the adjudicatory power vested in the Commission. *See, e.g., Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 7 (1985) (per curiam) (dismissing citation is within the Secretary's prosecutorial prerogative and, as such, is beyond Commission review.)[9] Similarly,

[8] The Secretary's interpretative positions taken for litigation purposes are not always consistent. The Sixth Circuit noted in a recent decision that the Secretary's interpretation of a regulation in litigation before it was contrary to the position she asserted in a prior case. *See Cleveland Electrical Illuminating Co. v. OSHRC*, —— F.2d ——, 14 O.S.H. Cas. (BNA) 1729, 1731 (6th Cir. 1990).

[9] Although an independent Commission forces a strict separation of powers under OSHA, due process under any regulatory scheme requires separation of powers even where they are distributed within the same agency. Those in charge of investigation or prosecution must be separated from those engaged in adjudication. If deference is automatically given to the prosecutorial body's interpretation of an ambiguous regulation, as the Secretary argues in this case, the judicial entity is relegated to acting as an arm of the prosecutor, quashing due process, or, at a minimum, fairness, in the process.

this Court has recognized that judicial deference is not owed to agency interpretations formed only during litigation. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

The Tenth Circuit's deference to the Commission realizes Congress' intent in creating an independent commission with full adjudicatory powers and corresponds with established law on judicial deference to agency actions. Accordingly, its ruling should be affirmed.

CONCLUSION

For all of the foregoing reasons, Amici Curiae respectfully urge this Court to affirm the decision of the Tenth Circuit in this case. The Tenth Circuit properly gave deference to the Commission's reasonable interpretation of an ambiguous regulation over the Secretary's prosecutorial interpretation of the same regulation.

Respectfully submitted,

Of Counsel:
JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500—North Lobby
Washington, DC 20004-1703
(202) 637-3058

WILLIAM H. CRABTREE
Vice President and
General Counsel
THOMAS R. MERLINO
MOTOR VEHICLE MANUFACTURERS
ASSOCIATION
7430 Second Ave., Suite 300
Detroit, MI 48202
(313) 872-4311

W. SCOTT RAILTON *
BROOKE BASHORE-SMITH
REED SMITH SHAW & MCCLAY
Ring Building
1200 18th Street, N.W.
Washington, DC 20036
(202) 457-6162
Counsel to Amici Curiae, National Association of Manufacturers and Motor Vehicle Manufacturers Association

September 19, 1990

* Counsel of Record